UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

MARK PETERSON,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 96-274-P-C***
	)	
WESLEY RIDLON, et al.,	***)***	
	)	
Defendants	***)***	

RECOMMENDED DECISION ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF DECISION ON PLAINTIFF'S MOTION TO STRIKE AND FOR SANCTIONS

The defendants, Wesley Ridlon and Cumberland County, move for summary judgment on the plaintiff's complaint, which alleges breach of an employment contract and constitutional violations under 42 U. S. C. § 1983. The plaintiff, a sergeant in the Cumberland County Sheriff's Department, which is headed by defendant Ridlon, moves for partial summary judgment as to liability and to strike portions of the materials submitted by the defendants in support of their motion, with associated sanctions. I deny the motion for sanctions and the motion to strike insofar as it addresses materials upon which my recommended decision relies. I recommend that the plaintiff's motion for partial summary judgment be denied and that the defendants' motion be granted in part. I also recommend that the pendent state-law claims be remanded to state court.

I. Summary Judgment Standards

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material facts and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining if this burden is met, the court must view the record in the light most favorable to the nonmoving party and "give that party the benefit of all reasonable inferences to be drawn in its favor." *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990) (citation omitted). "Once the movant has presented probative evidence establishing its entitlement to judgment, the party opposing the motion must set forth specific facts demonstrating that there is a genuine and material issue for trial." *Id*. at 73 (citations omitted); Fed. R. Civ. P. 56(e). A fact is "material" if it may affect the outcome of the case; a dispute is "genuine" only if trial is necessary to resolve evidentiary disagreement. *Ortega-Rosario*, 917 F.2d at 73.

The mere fact that both parties seek summary judgment does not render summary judgment appropriate. 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* ("Wright, Miller & Kane") § 2720 at 19. For those issues subject to cross-motions for summary judgment, the court must draw all reasonable inferences against granting summary judgment to determine whether there are genuine issues of material fact to be tried. *Continental Grain Co. v. Puerto Rico Maritime Shipping Auth.*, 972 F.2d 426, 429 (1st Cir. 1992). If there are any genuine issues of material fact, both motions must be denied as to the affected issue or issues of law; if not, one party is entitled to judgment as a matter of law. 10A Wright, Miller & Kane § 2720 at 24-25.

II. Motion to Strike and for Sanctions

The plaintiff moves to strike extensive portions of the defendants' Statement of Material Fact (Docket No. 12), portions of the affidavits of Madore and Ridlon, and many of the attachments to those affidavits, and for sanctions pursuant to Fed. R. Civ. P. 11, including the granting of his motion for partial summary judgment, because the challenged documents and statements are hearsay or not properly authenticated. The defendants in response do not address the challenged documents or the affidavits, confining their discussion to the challenged entries in their Statement of Material Fact. However, most of those entries necessarily depend on the affidavits or the documents, or both.

The plaintiff's request for sanctions is not made in the form required by Fed. R. Civ. P. 11(c)(1)(A). More important is the fact that the appropriate remedy for use of hearsay or unauthenticated documents in support of a motion for summary judgment is an objection to such proffered evidence and a motion to strike; Rule 11 is not designed to provide additional sanctions for such a lapse. The conduct at issue here, if it exists, is not within the definition of sanctionable activity under Rule 11(b). *See Phelan v. Local 305*, 973 F.2d 1050, 1065 (2d Cir. 1992). The motion for sanctions must be denied.

Many of the documents and statements attacked by the plaintiff are not necessary to the resolution of the motions for summary judgment and have not been relied upon by the court. These include Exhibits C, E, H, I and M to the Madore affidavit; Exhibits B, C, E, F, G and L to the Ridlon affidavit; paragraph 19 of the Madore affidavit; paragraphs 13-17, 29, 39, 42 and 43 of the Ridlon affidavit; and paragraphs 13, 15, 16, 31-33, 43, 46-47, 49-53 and 62-64 of the defendants' Statement of Material Fact. Those items will not be discussed further here.

The defendants assert that paragraphs 21, 26, 28, and 30 of their Statement, and presumably

Exhibits A and F to the Madore affidavit upon which those paragraphs rely, as well as paragraphs 8, 9, 12, 14, and 16 of that affidavit, to which they refer, are admissible under Fed. R. Evid. 803(6) and 803(8). Both of these exceptions to the hearsay rule, for business records and public records and reports, might well be applicable to the documents involved. More important is the fact that they were not used in this summary judgment proceeding to prove the truth of the matters asserted therein, so the documents were not hearsay as defined by Fed. R. Evid. 801(c). Exhibit A merely establishes the date upon which the internal affairs investigation started, who requested the investigation, and why it was requested; Exhibit F merely establishes that a subsequent investigative report was filed. The content of the statements of others reported in those documents is not basic to any necessary finding on summary judgment. There is no hearsay in the listed paragraphs of the Madore affidavit, and the content of paragraphs 12, 14, and 16, beyond the dates of the supplemental reports, is not basic to any necessary finding on summary judgment.

The defendants assert that paragraph 35 of their Statement is admissible under Fed. R. Evid. 404(b). The only possible hearsay in this paragraph, and in paragraph 31 of the Ridlon affidavit upon which it relies, is the statement that the purpose of the meeting on July 19, 1994, was explained and that the plaintiff was given an opportunity to respond to the allegations. The defendants' citation to Rule 404 does not address the hearsay objection, but neither assertion provides the basis for any necessary finding on summary judgment.

The defendants next address paragraphs 37 and 38 of their Statement, again relying on Rule 404(b). The only possible hearsay in paragraph 37 is a reference to concerns of the command staff. This assertion plays no part in the resolution of the summary judgment motions. The only portions of paragraph 38 necessary to resolution of the summary judgment motions are the facts that the

plaintiff was asked to undergo a psychological examination and that he declined to do so, both of which are included in the plaintiff's own affidavit. Plaintiff's Aff. ¶ 3. There is no evidence that the plaintiff suffered any adverse consequences from this refusal.

The defendants defend paragraph 45 of their Statement on the grounds of Fed. R. Evid. 404(b), 803(8) and 901. The related document is Exhibit A to the Ridlon affidavit. The Ridlon affidavit establishes that Exhibit A is a Sheriff's Department record of regularly conducted business activity within the meaning of Rule 803(6). In addition, authenticity has been established under Rule 901 on this record.

Paragraphs 54-57 of the defendants' Statement concern the plaintiff's transfer from Transport to Corrections and the arbitration arising from that transfer. The defendants assert that paragraphs 54-56 are admissible under Rules 404(b) and 803(8); they do not address paragraph 57. These paragraphs are based on Paragraphs 18-21 of the Ridlon affidavit and Exhibit H to that affidavit, the report of the arbitrator. The report qualifies under Rule 803(8), as a record, report or statement of a public agency setting forth both matters observed pursuant to duty imposed by law as to which there was a duty to report and factual findings resulting from an investigation made pursuant to authority granted by law. While defendant Ridlon's affidavit, to the extent that it repeats statements found in the report, may technically be hearsay, that fact is unimportant when the report itself is properly before the court. The statements in paragraph 20 of that affidavit are also established by Exhibit 6 to the Ridlon deposition, which was marked and utilized at that proceeding by plaintiff's counsel. Ridlon Dep. at 15.

Finally, the defendants rely on Rule 404(b) to support paragraphs 58 and 59 of their Statement. These paragraphs rely on paragraphs 22 and 23 and Exhibit I of the Ridlon affidavit. As

previously noted, Rule 404(b) does not address the plaintiff's hearsay objection. Exhibit I is Ridlon's own written statement to the plaintiff revoking the plaintiff's deputy sheriff commission. It is clearly within the Rule 803(6) business records exception to the hearsay rule, and Ridlon's affidavit is sufficient to provide the basis for this exception. Most of the information in paragraphs 22 and 23 of the Ridlon deposition is also available in his deposition, taken under oath by counsel for the plaintiff. Ridlon Dep. at 31. The only information that does not appear in the deposition transcript but is present in the affidavit that is relevant to the disposition of the summary judgment motions is the date of the revocation, information which cannot be in serious dispute.

For the foregoing reasons, the motion to strike, which objects to the defendants' submissions in support of their position as not being of evidentiary quality, is denied to the extent that the motion addresses submissions upon which I rely in reaching a recommendation on the motions for summary judgment; in all other respects, the motion to strike is moot.

III. Factual Background

The plaintiff is a sergeant in the Cumberland County Sheriff's Department. This fact is basic to his claims and does not appear to be in dispute, although it is not included in either statement of material facts. Nonetheless, the parties' motions and memoranda assume this fact and the court will infer its existence from the summary judgment record.[1] Defendant Ridlon is the sheriff for Cumberland County. Affidavit of Sheriff Wesley Ridlon ("Ridlon Aff.") (Docket No. 13) ¶ 1. Defendant Cumberland County is defendant Ridlon's employer. *Id*. Two other defendants named

[1] Counsel are reminded that critical facts, even though not in dispute, must be documented by being included in a statement of material facts supported by appropriate citations to the record. Loc. R. 56.

in the amended complaint have been dismissed from this action on motion of the plaintiff. Docket No. 19.

The plaintiff is a member of the American Federation of State, County and Municipal Employees Council 93, the union to which members of the Corrections Division of the Cumberland County Sheriff's Department belong. Ridlon Aff. ¶ 41. As such, his employment is governed by a collective bargaining agreement. Plaintiff's Affidavit ("Plaintiff's Aff.") (Docket No. 10) ¶ 13. The plaintiff has provided the court with one page from the agreement in force in 1994, *id.* Attachment [1], and the full agreement in force between January 1, 1995 and December 31, 1996, Plaintiff's Supplemental Affidavit (Docket No. 23), Exh. A.

In 1994, Beatrice Marois obtained a protection from harassment order from the Maine District Court against the plaintiff. Plaintiff's Aff. ¶ 2; Deposition of Beatrice A. Reed ("Reed Dep.") at 11, 51-52, 86. Ms. Marois' complaint to the Bath Police Department in connection with her decision to seek this order was conveyed to the Cumberland County Sheriff's Department, and an internal investigation ensued, beginning on June 6, 1994. Affidavit of Lieutenant Joseph Madore ("Madore Aff.") ¶ 7. During the course of the investigation, the plaintiff was asked by the then administrator of the Cumberland County Jail, where the plaintiff worked, to undergo a psychological evaluation. Ridlon Aff. ¶ 34. The plaintiff declined to do so. Plaintiff's Aff. ¶ 3. The initial internal affairs investigation was completed on June 15, 1994. Madore Aff. ¶ 10. Supplemental investigation reports were issued on October 17, 21, 24 and 28, 1994. *Id.* ¶¶ 14-17. A pre-determination hearing to address the allegations against the plaintiff was held on September 1, 1994. Ridlon Aff. ¶ 35. The consultant who conducted the hearing on behalf of the Sheriff's Department never provided the Department with her findings and recommendations, and no disciplinary action

has been taken against the plaintiff as a result of the Marois complaint. *Id.* ¶ 36.

The plaintiff was transferred from the Transport Unit of the Sheriff's Department to a shift supervisor position for the second shift at the jail, a position in the Corrections Unit, effective May 1, 1994. Plaintiff's Aff. ¶ 4; Ridlon Aff. ¶ 20. The Personnel Change Notice effectuating this change notes that it is a temporary assignment. Deposition of Sheriff Wesley Ridlon ("Ridlon Dep."), Exh. 4. The change was made permanent effective July 3, 1994. *Id*. Exh. 5. The plaintiff filed a grievance concerning this transfer, which was denied by an arbitrator on July 22, 1995, after hearing. Ridlon Aff., Exh. H at 11. Although the plaintiff refers to this transfer as a demotion, the arbitrator found that "no actual loss was shown." *Id*. at 6.

The plaintiff was removed from the Emergency Services Unit of the Sheriff's Department, a volunteer operation, on July 19, 1994, by the captain in command of that unit, for the stated reasons of failure to notify the commander about his medically-related absence from work and his failure to notify the commander on his return to work. *Id.*, Exh. A.

The plaintiff participated in the Sheriff's Department Honor Guard until he was removed from the Emergency Services Unit. Affidavit of Deputy Michael Pralicz (Docket No. 16) ¶ 5. After he was removed from the Emergency Services Unit, the plaintiff was no longer authorized to carry a sidearm, a requirement for participation in the Honor Guard. *Id*. ¶¶ 5-6. The supervisor of the Honor Guard stopped using the plaintiff as a member after his removal from the Emergency Services Unit. *Id.* ¶ 7.

The Sheriff's Department also has a Patrol Division. Affidavit of Sergeant Robert E. Walsh ("Walsh Aff.") (Docket No. 15) ¶ 2. The supervisor of that division may use reserve deputies not assigned to the Patrol Division to fill shift vacancies when they arise, at his discretion. *Id.* ¶ 8. The

plaintiff filled such vacancies two or three times between 1994 and 1997. *Id.* ¶ 7. He was eligible to serve in this capacity so long as he held a commission as a deputy sheriff. Ridlon Aff. ¶ 40. Defendant Ridlon revoked the plaintiff's commission as a deputy sheriff on July 29, 1996, at the recommendation of the jail administrator who determined that the position held by the plaintiff did not require such a commission. *Id.* ¶¶ 22-23. The deputy sheriff commissions of employees other than the plaintiff were also revoked. *Id.* ¶ 24. The plaintiff was informed in writing that the revocation was not a disciplinary action. *Id.* ¶ 24 & Exh. I.

The plaintiff states that each of these actions "resulted in losses in pay and losses in overtime and paid training." Plaintiff's Aff. ¶ 4. He also states that each of these actions followed the Marois complaint. *Id.* The plaintiff filed this action in the Maine Superior Court (Cumberland County), alleging constitutional violations under 42 U.S.C. § 1983 based on his rights to due process of law and privacy and damage to his reputation, and breach of contract. Amended Complaint ¶¶ 15-21. The action was removed to this court by notice dated September 11, 1996. Docket No. 1.

IV. Analysis

A. The Constitutional Claims

The plaintiff seeks summary judgment as to liability on both remaining counts of the amended complaint (Counts I and II). The defendants seeks summary judgment on these claims as well. The subject matter of both motions is the same, and they will be addressed together.

Count I of the amended complaint is brought under 42 U. S. C. § 1983. The plaintiff bases this count on allegations of violation of his rights to privacy and due process of law and on injury

to his reputation.

The plaintiff does not specify the manner in which he alleges that his right to privacy was violated by the defendants; the basis for this claim is unclear in his pleadings. Nor does he cite any section of the Constitution as the basis for his claim. If the basis of that claim is the Fourth Amendment, the Maine Law Court has held that such a claim must fail in the absence of an allegation of any search or seizure, or even the threat of a search or seizure. *Struck v. Hackett*, 668 A.2d 411, 418 (Me. 1995); *see Cochrane v. Quattrocchi*, 949 F.2d 11, 13 (1st Cir. 1991) (privacy right under Fourth Amendment is right to be free from unreasonable searches and seizures). That is the case here. In the absence of any further citation by the plaintiff of a source for his claim, *see Borucki v. Ryan*, 827 F.2d 836, 839-49 (1st Cir. 1987) (discussing various bases for constitutional protection of privacy), the defendants are entitled to summary judgment on any claim based on the right to privacy.

The plaintiff is similarly cryptic concerning his reputation claim. He merely asserts in his affidavit, in conclusory fashion, that the defendants "have acted with malice and/or reckless indifference to . . . my public image, professional reputation and prospects for future employment." Plaintiff's Aff. ¶ 9. This statement is repeated, without elaboration, in the plaintiff's memorandum of law in support of his motion. Motion for Summary Judgment ("Plaintiff's Motion") (Docket No. 8) at 3. The plaintiff provides no citation to authority in support of this argument, and the defendants do not respond to it. However, some clarification is required at this point. The due process guarantee of the Constitution does not extend to enjoyment of reputation. *Paul v. Davis*, 424 U.S. 693, 711-12 (1976). *See also Board of Curators v. Horowitz*, 435 U. S. 78, 83-84 (1978) (plaintiff cannot establish a deprivation of his liberty interest in his reputation or freedom to take advantage

of other employment opportunities in absence of evidence of publication of the allegedly damaging information; here, the plaintiff has offered no such evidence). Compensatory damages available in section 1983 claims include impairment of reputation. *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986). Thus, any evidence of impairment of the plaintiff's reputation will be relevant in this proceeding only if a constitutional violation is established, and the ensuing damages are to be evaluated; such evidence alone cannot be used to establish a constitutional violation.

The plaintiff's remaining constitutional claim is that he was deprived of a property interest without due process of law. The defendants argue that the plaintiff had no property interest in the specific positions that form the basis of his claim, or, in the alternative, that they are entitled to qualified immunity. They also assert that the County has no liability under the circumstances of this case, in that the alleged actions are not the result of a custom or practice, and that the existence of administrative remedies for this claim under the collective bargaining agreement constitutes a remedy under state law sufficient to bar the section 1983 claim.

The plaintiff bases his claimed property interest on 30-A M.R.S.A. § 501[2] and Maine case

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[2] That statute provides, in pertinent part:

> **3. Dismissal, suspension, discipline**. A county officer or department head may dismiss, suspend or otherwise discipline a department employee only for cause, except as provided in paragraph A. Cause for dismissal, suspension or disciplinary action must be a just, reasonable, appropriate and substantial reason for the action taken that relates to or affects the ability, performance of duties, authority or actions of the employee or the public's rights or interests.
> * * * * *
>
> **B**. In every case of suspension or disciplinary action other than dismissal, at the employee's request, the county commissioners or personnel board shall investigate the circumstances and fairness of the action and, if they find the charges unwarranted, shall order the

(continued...)

law. However, the cases cited by the plaintiff establish only that a plaintiff has a property interest in continued employment. Here, the plaintiff continues to be employed by the Sheriff's Department. The statute does state that an employee of the County may be disciplined only for cause; the defendants deny that any discipline took place. In any event, this dispute is not relevant to the question whether there exists a property interest in a particular employment position or one with particular characteristics.

The plaintiff's due process claim is based on five incidents or situations: 1) his transfer from Transport to Corrections; 2) his removal from the Emergency Services Unit; 3) his "removal" from the honor guard; 4) his "removal" from part-time patrol work; and 5) the revocation of his deputy sheriff commission.[3] The first incident was the subject of a grievance, brought by the plaintiff under the collective bargaining agreement in force at the time of the transfer, which was resolved in arbitration. Decision and Award, Exh. H to Ridlon Aff., at 1-2. By the terms of the collective bargaining agreement, the decision of the arbitrator is final and binding on the parties, and a decision

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[2](...continued)

> employee's reinstatement to the employee's former position with no loss of pay, rights or benefits resulting from the suspension or disciplinary action.

[3] The plaintiff also asserts, in conclusory terms, that since the filing of the initial complaint in this action, he has been "repeatedly requir[ed]. . . to report for internal affairs questioning in cases which have no merit and are brought solely [for] purposes of harassment[,] . . . singled out for selective enforcement of disciplinary policies and subjected to retroactive application of a new policy regarding sick time to events prior to the promulgation of the policy." Plaintiff's Aff. ¶ 8. In the complete absence of any factual support for these statements, they will not be considered in evaluating the motions for summary judgment. *Fleet Nat'l Bank v. H & D Entertainment, Inc.,* 96 F.3d 532, 540 (1st Cir. 1996); *Krennerich v. Inhabitants of the Town of Bristol,* 943 F. Supp. 1345, 1357 (D. Me. 1996).

to submit a grievance to arbitration waives all other remedies or forums.[4] Agreement, Exh. A to Plaintiff's Supp. Aff., Art. 3(D), Step 4, and Art. 3(D) [sic] (3). However, because the plaintiff claims a violation of his constitutional due process right, which he could not raise in the arbitration proceeding, he may raise this issue again in this forum. *Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32, 39 n.3 (1st Cir. 1992).

The issue is thus whether the cited items constitute property interests entitled to constitutional protection. Property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Without an underlying property interest in his assignment to the transport division, his membership in the emergency services unit and the honor guard, his eligibility for part-time patrol work, and his commission as a deputy sheriff, the plaintiff cannot seek due process relief. *Volk v. Coler*, 845 F.2d 1422, 1430 (7th Cir. 1988); *see Jimenez-Torres de Panepinto v. Saldana*, 834 F.2d 25, 27 (1st Cir. 1987). The existence of a property interest depends solely on state law. *Jimenez-Torres*, 834 F.2d at 27.

The plaintiff provides no evidence of existing rules or understandings stemming from an independent source that secure his continued assignment to the transport division, his membership in the emergency services unit or the honor guard or his eligibility for part-time patrol work. In the

[4] The plaintiff remained a sergeant after the transfer. In the absence of the full collective bargaining agreement in force at the time, it is not possible to determine whether he retained the same pay rate. That would have been the case under the subsequent agreement. Agreement, Exh. A to Plaintiff's Supp. Aff., at Appendices A-1, A-2 and B. A lateral transfer that does not result in a loss of pay does not violate constitutional due process guarantees. *Greenberg v. Kmetko*, 840 F.2d 467, 475 (7th Cir. 1988).

absence of such evidence, he cannot establish a property interest in those positions. *Hammond v. Temporary Compensation Review Bd.*, 473 A.2d 1267, 1271-73 (Me. 1984) (state employees had no property interest in any particular job classification or salary). *See also Bleeker v. Dukakis*, 665 F.2d 401, 403 (1st Cir. 1981) (if state officials violate terms of an employment contract that does not create a property interest in the particular position itself, proper remedy lies in suit for breach of contract, not a § 1983 action).

The plaintiff does argue that he held the transport position as a result of a "mutually explict [sic] understanding that I could remain in that position as long as it existed and I continued to perform adequately." Plaintiff's Supp. Aff. ¶ 8. This claim is not included in the Plaintiff's Supplemental Statement of Facts. Docket No. 21 at 5-8. In addition to this procedural waiver, and the lack of any evidentiary support for the statement, he offers no evidence that the position continued to exist after his transfer. He has therefore failed to provide evidence sufficient to support his allegation of a property interest in the transport position, by the terms of his own proffered basis for that claim.

The plaintiff also suggests that a property interest in the emergency services position is established by the facts that he was ordered on July 14, 1994, to report for further training with the unit on July 22, 1994, and that his status with the unit had been evaluated "shortly before the Marois complaint . . . without any indication of any problem at that time." Plaintiff's Supp. Aff. ¶ 3. The plaintiff was removed from the unit by a memorandum dated July 19, 1994. Ridlon Aff., Exh. A. While each of these incidents may have led the plaintiff to believe that he would continue to serve on the voluntary unit, neither can be taken to promise or otherwise secure his continued service.

With regard to the only remaining property interest asserted by the plaintiff, his commission

as deputy sheriff, the plaintiff relies on 30-A M. R. S. A. § 381(3)(A) as the source of his alleged right to continue to hold that status. That statute provides that the failure to reappoint a deputy sheriff, whose terms are limited to three years, "is subject to the procedures and standards for dismissal of an applicable collective bargaining agreement." The plaintiff notes that the collective bargaining agreement between his union and the County provides that dismissal shall only be for cause, and he argues that section 381 therefore limits revocation of deputy sheriff status only to situations in which there is a finding of cause. The fact that revocation of a commission, rather than failure to reappoint, occurred in this case is a difference without significance in terms of the interpretation to be given to the statute.

The fact that the plaintiff has established a possible property interest in his status as a deputy sheriff[5] does not bring the due process inquiry to an end. The due process to which the plaintiff claims he is entitled is prior notice and hearing before the commission is revoked. Plaintiff's Motion at 4. Three factors must be considered in assessing whether there has been a denial of due process: the importance of the interest of which the plaintiff has been deprived; the risk that the deprivation was erroneous because a particular procedural safeguard was not provided; and the burden to the state of providing that safeguard. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). There is no constitutional requirement that a pre-deprivation hearing be held in every case. *Brown v. Brienen*, 722 F.2d 360, 365 (7th Cir. 1983) ("[T]he Constitution must not be trivialized by being dragged into every personnel dispute in state and local government.") The plaintiff does not argue that a post-deprivation remedy could not make him whole. The collective bargaining agreement provides the

[5] *But see Rode v. Dellarciprete*, 845 F.2d 1195, 1205 (3d Cir. 1988) (employment decisions which do not terminate or abridge employment contract and which could be litigated in state courts do not constitute deprivations of property interests under the fourteenth amendment).

plaintiff with a grievance procedure to address this deprivation, and, to the extent that the revocation may be construed as discipline, as the plaintiff alleges, 30-A M. R. S. A. § 501(3)(B) provides him the right to an investigation by the county commissioners or personnel board at his request, with reinstatement as a potential remedy.

The only evidence in the summary judgment record of the extent of the deprivation caused by the plaintiff's loss of his commission as a deputy is that, as a result, he is unable to work on an "as needed" basis in the patrol division, which he had done only two or three times before the revocation, Walsh Aff. ¶¶ 5,7, and with the emergency services unit or honor guard, Plaintiff's Supp. Aff. ¶ 5. The plaintiff presents no evidence that his inability to serve with either of the latter results in any loss of income or benefits. Under these circumstances, the property interest at issue cannot be considered substantial. *See generally Brown*, 722 F.2d at 365-66. Even if the property interest at stake were sufficiently important to require application of the second and third elements of the *Mathews* test, there is no evidence in the summary judgment record to suggest that a pre-revocation hearing would have significantly reduced the probability that the sheriff would have approved the jail administrator's recommendation. More important is the fact that such a procedural safeguard would have been costly to the public; the burden on the Sheriff's Department would be heavy if it had to grant a hearing every time it determined that it had excessive numbers of deputy sheriffs. *See Needleman v. Bohlen*, 602 F.2d 1, 5-6 (1st Cir. 1979) (contractual grievance procedure constitutes constitutionally adequate due process to protect property interest in annual salary increment); *Maples v. Martin*, 858 F.2d 1546, 1551 (11th Cir. 1988) (grievance procedure satisfies due process requirement if there is a property interest at stake).

Because there was no denial of due process under the circumstances presented on the

summary judgment record, the defendants are entitled to summary judgment on the section 1983 claim.

B. Pendent State Contract Claim

When summary judgment is entered against a plaintiff on the party's federal claims, the court has the discretion to dismiss pendent state-law claims against the same defendant. *See* 28 U. S. C. § 1367(c)(3); *Burns v. Loranger*, 907 F.2d 233, 234 n.1 (1st Cir. 1990); *Mladen v. Gunty*, 655 F. Supp. 455, 460-61 (D. Me. 1987); 13B C. Wright, A. Miller and E. Cooper, *Federal Practice and Procedure*, § 3567.1 at 133-37 (1984). To the extent that the plaintiff's complaint states a cause of action arising under Maine contract law, it is the only claim to survive the defendants' summary judgment motion and I can discern no compelling reason why this court should retain jurisdiction to decide any remaining state-law issues. Because this action was removed to this court from state court, remand rather than dismissal is appropriate. I conclude that the remaining state-law claim in this action should be remanded to the Maine Superior Court.

V. Conclusion

For the foregoing reasons, I deny the motion for sanctions and the motion to strike insofar as it addresses submissions upon which I have relied in addressing the motion for summary judgment; in all other respects the motion to strike is moot. I recommend that the plaintiff's motion for partial summary judgment be **DENIED**; recommend that the defendants' motion for summary judgment be **GRANTED** as to Count I of the amended complaint; and recommend that the pendent state-law contract claim be remanded.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 25th day of April, 1997.

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David M. Cohen
United States Magistrate Judge